Oregon Public Employment Relations Board

In the Matter of an Arbitration Between OREGON STATE POLICE OFFICERS' ASSOCIATION And OREGON DEPARTMENT OF STATE POLICE (Kirk Melahn Termination)	)	**ARBITRATOR'S** **DECISION AND AWARD**

I. INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the OREGON STATE POLICE OFFICERS' ASSOCIATION (hereinafter the ASSOCIATION), on behalf of Kirk Melahn, and the OREGON DEPARTMENT OF STATE POLICE (hereinafter the EMPLOYER or STATE), under which DAVID GABA was selected to serve as Arbitrator and under which his Award shall be final and binding among the parties.

A hearing was held before Arbitrator Gaba on June 7-9, 2000 at Grants Pass, Oregon. The parties had the opportunity to examine and cross-examine witnesses, introduce exhibits, and fully argue all of the issues in dispute. No transcript of the proceedings was provided. Both parties filed post-hearing briefs on or about July 21, 2000.

APPEARANCES:

On behalf of the Association:

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II. ISSUES

The Oregon State Police Officers' Association and the Oregon State Police are parties to a collective bargaining agreement dated July 1, 1997 through June 30, 1999.

The parties stipulate to the following statement of the issues:

> Did the State have just cause to terminate the Grievant, Senior Trooper Kirk Melahn? If not, what is the appropriate remedy?

III. CONTRACT PROVISIONS

The "Collective Bargaining Agreement Between State of Oregon and Oregon State Police Officers' Association"[1] states in **Article 11 - DISCIPLINE AND DISCHARGE, Section 11.1 - Discipline** that:

> Disciplinary action, including discharge, shall be only for just cause.

Section 11.4 - Pre-Discharge Notice states that:

> A written pre-discharge notice shall be given to a regular-status employee who is being considered for discharge. Such notice shall include the known complaints, facts and charges and a statement that the employee may be discharged. The employee shall be afforded an opportunity to refute such charges or present mitigating circumstances to the Employer at a time and date set forth in the notice, which date shall not be less than seven (7) calendar days from the date the notice is received or, at the option of the employee, by written response by that date. The employee shall be permitted to have an Association representative present.

Section 11.5 - Remedies further states that:

> Any employee found to be unjustly disciplined or discharged may be reinstated with full compensation for all lost time and with full restoration of all other rights and conditions of employment, unless otherwise provided by the Arbitrator.

IV. FACTS

Kirk Melahn was hired as a Trooper by the Oregon State Police Department on March 1, 1987. On March 1, 1995 he was promoted to the rank of Senior Trooper.

Trooper Melahn was rated satisfactory by Sergeant Ralph Nelson in all core element categories except communications skills (for which he received an unsatisfactory) on his

[1] Exhibit A-1.

Employee Performance Review for the period of 3-1-95 to 2-29-96, resulting in an overall score of 90 out of a possible 100.[2] His ratings on all core element categories for his next performance review by Sergeant Nelson, for the period of 2-29-96 to xx-xx-96 (date illegible in Exhibit), were satisfactory, for a total score of 100.[3] The total score on the subsequent review, for the period from 3-1-96 to xx-28-97 (month illegible in Exhibit) was also 100; this was the first review conducted by Sergeant Kuehmichel, the supervisor who later terminated him.[4] Trooper Melahn received satisfactory ratings in all categories except safety, for an overall score of 90, on his next review for the period from 3-1-97 to 2-28-98.[5] The following review, for the period of 3-1-98 to xx-31-98 (month illegible in Exhibit), contained unsatisfactory ratings for Trooper Melahn on safety, job knowledge/application, civil rights and interpersonal relations, giving him a total score of 60.[6] Another review for 3-1-98 to 2-28-99 contained unsatisfactory ratings on job knowledge/application, civil rights, communications skills, interpersonal relations and initiative, for a score of 50.[7]

On April 27, 1997, Trooper Melahn received a Letter of Reprimand from Sergeant Kuehmichel for passing two other patrol vehicles in a pursuit.[8] On May 1, 1998, Trooper Melahn received a six month, one step salary reduction from Sergeant Kuehmichel for involving himself with witnesses in a criminal matter involving another trooper.[9] On January 28, 1999,

[2] Exhibit E-3.
[3] Exhibit E-4.
[4] Exhibit E-5.
[5] Exhibit E-8.
[6] Exhibit E-11.
[7] Exhibit E-13.
[8] Exhibit E-7.
[9] Exhibit E-10.

Trooper Melahn received another six month, one step salary reduction from Sergeant Kuehmichel for late report writing.[10]

On the evening of May 30, 2000, then Senior Trooper Kirk Melahn was contacted by telephone by OSP Dispatcher Paul Sanderson and dispatched to a call that was described as either a 12-35 or a 12-16 (codes for an abandoned vehicle and for an accident), and for which he was told no medical assistance was being sent. He had already reported for duty. Trooper Melahn proceeded to drive through a residential neighborhood in the dark at more than 50 mph and then onto the freeway to the scene of the call. Two neighbors of Trooper Melahn, Laura and John Zeliff, who are supervisors in the Grants Pass Police Department, reported him for what they perceived to be his driving at excessive speed through a residential neighborhood. The speed at which Trooper Melahn was proceeding was later acknowledged by him to be somewhere around 45 mph.[11]

On June 4, 1999, Sergeant Richard Kuehmichel informed Trooper Melahn of the complaint and on August 20, 1999, he was terminated by the Oregon State Police.[12] The Association filed an appeal of the termination on August 20, 1999.[13]

V. POSITION OF THE ASSOCIATION

The Association asserts that as a non-probationary employee Senior Trooper Melahn could not be terminated except for just cause and that the State failed to meet the burden of proof necessary to justify his termination.

[10] Exhibit E-12.
[11] Exhibit E-28.
[12] Exhibit E-34.
[13] Exhibit A-2.

The Association contends that the State failed to give Senior Trooper Melahn forewarning or foreknowledge of the possible or probable disciplinary consequences of his actions. None of the troopers who testified at the arbitration hearing believed they could be disciplined, let alone terminated, for speeding in a residential neighborhood to a call.[14] Testimony of the troopers also indicated that they are told to keep their vehicles 100 percent in control, 100 percent of the time. The Association notes that Policy Chapter 502.14, Accident Investigation, does not directly dictate any particular speeds or adherence to speed limits for responding officers, but rather specifies that "patrol vehicles must be driven safely."[15] It is the Association's conclusion that:

> There is no policy about appropriate speeds in a residential neighborhood. There is no policy articulating emergent and non-emergent speeds. There is no policy which states that an employee can be terminated for responding in a manner consistent with the more serious call when told it may be an accident or an abandoned vehicle. The State did not have just cause to terminate Senior Trooper Kirk Melahn."[16]

The Association further contends that the application of the State's rules in this instance was not reasonably related to (a) orderly, efficient and safe operation of the Agency, and (b) the performance the State might expect of Senior Trooper Melahn, and that Sergeant Kuehmichel's application of the rules in this instance was unreasonable, inasmuch as the State never offered proof that Trooper Melahn's behavior on May 30, 1999 was a violation of policy and a termination offense. It is the Association's contention that "Sergeant Kuehmichel's interpretation of the Agency's rules was unsupported by any documentation history, or practical training," whereas "Melahn's interpretation of the driving requirements was supported by

[14] Association's Post-Arbitration Memorandum at p. 7, citing testimony by Troopers McGill, Snook, Melahn and Botwinis.
[15] Exhibit E-20.
[16] Association's Post-Arbitration Memorandum at p. 9 - 10.

training (testimony of McGill; Exhibit A-5), history (testimony of McGill, Snook, Melahn, Botwins), and practicality."[17]

The Association asserts that the State did not make an effort to discover whether Senior Trooper Melahn did in fact violate or disobey a rule or order of management before administering discipline, and that the investigation conducted by Sergeant Kuehmichel did not comply with the State's policy manual on internal affairs investigations with respect to either establishment of objective facts or timeliness of the investigation.[18] The Association argues that the State's investigation was not conducted fairly and objectively and that all data were considered in the light least favorable to Senior Trooper Melahn because of bias on the part of Sergeant Kuehmichel. The Association points out that Sergeant Kuehmichel personally performed acceleration tests and thereby inserted himself into the investigation as a witness and destroyed his objectivity.[19] Sergeant Kuehmichel's reliance on the Zeliff version of events, his failure to ask the Zeliffs what the Association deems relevant questions, and his failure to question the dispatcher, Paul Sanderson, are all cited by the Association as evidence that Sergeant Kuehmichel's investigation was biased and incomplete.

The State did not, in the Association's view, find substantial evidence that Trooper Melahn was guilty as charged, nor has the State applied its rules, orders and penalties evenhandedly and without discrimination:

> The State could not articulate <u>any</u> instances of similar discipline when questioned by the Arbitrator whether others had been disciplined for like conduct. The fact is, Kirk Melahn was terminated, not because of his conduct on May 30, 1999, but because of an assumption by the State that he must have exercised poor judgment on that night since he had been disciplined on two separate occasions in the year prior. Proof of prior misconduct does not equate to reasonableness or evenhandedness towards the current conduct. The State does not terminate its

[17] *Id* at p. 10.
[18] Association's Post-Arbitration Memorandum at p. 13.
[19] *Id* at p. 15 - 16.

> troopers for speeding. The State did not have just cause to do so in Senior Trooper Kirk Melahn's case.[20]

The Association maintains that the degree of discipline administered by the State was disproportional to the seriousness of the alleged offense, even had that offense been satisfactorily proven. It is the contention of the Association that the State did not prove that Trooper Melahn violated any policies on May 30, 1999 and that there were errors of fact in Sergeant Kuehmichel's dismissal letter of August 20, 1999. The Association further maintains that the State terminated Trooper Melahn not because of his conduct on May 30, 1999, but because of his previous employment history. The Association argues that Trooper Melahn's termination was unreasonable in that Trooper Melahn's conduct in this instance did not violate policy and that, even if the Arbitrator were to find a technical violation of policy, it was not sufficient to warrant termination.

VI. POSITION OF THE STATE

It is the position of the State that the proper context for the termination decision made by Sergeant Richard Kuehmichel appropriately included both previous disciplinary efforts with State Trooper Melahn on judgment issues and evidence concerning what the State determined to be his final incident of poor judgment. The State maintains that good judgment is an explicit requirement for the patrol position previously held by him, that the assessment of Trooper Melahn was properly based on previous employment history, and that previous arbitration decisions have recognized Employer's right to require good judgment.

[20] *Id* at p. 21.

The State places great emphasis on Trooper Melahn's previous employment history with respect to scores on employee performance reviews, as well as to incidents resulting in a letter of reprimand and two separate six month, one step salary reductions.

With respect to Trooper Melahn's scores on employee reviews, the State notes that his prior supervisor, Sergeant Nelson, found occasion to rate Trooper Melahn as unsatisfactory with regard to Core Element 7, Communication Skills, in the review he conducted in February 1996, citing Trooper Melahn's "unsatisfactory communication skills with his dispatchers."[21] The State notes that Sergeant Kuehmichel's initial review of Trooper Melahn conducted in February 1997 was favorable, commenting that "this work product demonstrates that Sergeant Kuehmichel would focus on behaviors and had no preconceived agenda against the grievant."[22]

The first performance issue that required direct supervisor intervention occurred in April 1997 and was the result of Trooper Melahn passing two other patrol vehicles in the course of responding to a non-injury collision. The Letter of Reprimand prepared by Sergeant Kuehmichel concluded that Trooper Melahn's action had been in violation of Chapter 502.14, Procedures 1 and 2, of the Department's Policy and Procedures Manual, which is cited in that letter as stating:

> You shall refrain from operating any patrol vehicle in a manner that endangers members of the public without justification.[23]

The letter concludes by informing Trooper Melahn that:

> It is important that you realize the danger you place members of the public in responding to an incident not requiring an emergency life threatening response.[24]

The State goes on to point out that:

> As the discipline noted, Grievant was responsible to follow Chapter 502.14 of the Department's Policy and Procedures Manual (PRP). Thus, even if responding to

[21] Exhibit E-3.
[22] Employer's Brief at p. 3.
[23] Exhibit E-7.
[24] *Id.*

> an accident or crash, there was not an unfettered right to drive too fast or otherwise endanger the public.[25]

This episode also resulted in Trooper Melahn receiving an unsatisfactory rating on the fourth core element, safety, on his next performance review.[26]

The performance review conducted in May 1998 made extensive reference to the episode that resulted in the first of two six month, one step pay reductions. The economic sanction was a consequence of an investigation characterized as follows in the language of the review:

> This investigation concerned his knowledge of another member's misconduct concerning sexual harassment of a female in the District Attorney's Office and failure to report this misconduct to a supervisor. Another sustained allegation in this investigation was his disobeying an order of a superior officer to have no contact with a witness in the investigation of these allegations. Both actions resulted in disruption of the Grants Pass Office and Josephine Co. D.A.'s office.[27]

The investigation of Trooper Melahn's behaviors with regard to this episode also resulted in a discipline letter on May 1, 1998 which provided both a narration of the supporting facts and a conclusion detailing the specific violations resulting from the facts.[28] A major concern of Sergeant Kuehmichel in his discipline letter and a major issue for the State is that Trooper Melahn's written response to the finding of fact concerned itself with his not having violated several Oregon Revised Statutes. The State notes that:

> The tendency to rely on the criminal code to establish performance standards would result in the lowest possible standards. The association has not argued that the department must accept a minimalist standard of not violating the penal code as setting the optimum performance standard for sworn members.[29]

Finally, the State emphasizes that the discipline letter clearly contains an explicit warning that Trooper Melahn make sure his future conduct is in compliance with department standards:

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[25] Employer's Brief at p. 3.
[26] Exhibit E-8.
[27] Exhibit E-11.
[28] Exhibit E-10.
[29] Employer's Brief at p. 4.

> Future disregard of the Department rules and regulations may result in more severe disciplinary action, up to and including dismissal.[30]

Sergeant Kuehmichel at this time noted in his performance review that Trooper Melahn had been provided with Department EVOC training after receiving the 1997 Letter of Reprimand regarding driving safety. To address the concerns documented in the May 1, 1998 disciplinary letter, Sergeant Kuehmichel took several actions, relieving Trooper Melahn of his public relations duties and providing for him to review the Rules of Conduct in Chapter 300.1 of the Department's Policy and Procedures Manual (PRP).[31]

In January 1999 Trooper Melahn received another six month, one step salary reduction for late submission of reports and failure to submit reports. The January 28 disciplinary letter provided to him by Sergeant Kuehmichel is detailed with respect to incident dates, report due dates and length of time reports were in arrears, and the State emphasizes that the language of this letter includes a strongly worded final warning:

> I must advise you that this is a FINAL WARNING. You must immediately and permanently correct the above categories of unacceptable performance. There will be no further warnings, and reoccurrence of these behaviors will result in the implementation of pre-dismissal proceedings. In addition, you must comply with all Department performance standards. Future problems concerning any performance or behavior issues will be judged in the context of this action. I truly hope you will focus on meeting basic standards so that no further action is necessary.[32]

It is the State's contention that "the above record would put the normal employee on notice that on-going performance issues concerning effective judgment were at issue."[33] The State maintains that Trooper Melahn's behavior on May 30, 1999 was a demonstration of poor judgment that was a second instance of documented poor driving practice on his part (the first

[30] Exhibit E-10.
[31] Exhibit E-11.
[32] Exhibit E-12.
[33] Employer's Brief at p. 7.

being the incident that resulted in the April 27, 1997 Letter of Reprimand) and showed disregard for training (including Department EVOC training) he had received subsequent to that 1997 episode.

The State argues that the May 30, 1999 occurrence, taken in concert with Trooper Melahn's previous offenses, was sufficient to warrant termination of his employment. The Acknowledgement Statement for Manual on Policies, Rules and Procedures signed by Trooper Melahn on December 6, 1994 makes it clear that employees of the Oregon State Police are expected to refer to the Manual or seek supervisory assistance if they have any uncertainty as to appropriate courses of action.[34] The Position Description for Trooper Melahn's position is also cited by the State as clearly stating that the position of Senior Trooper "requires the use of good judgment" and requires "maturity, integrity and responsibility necessary to exercise police powers."[35]

In conclusion, the State proposes a hypothetical civil action based upon Trooper Melahn's behavior on the evening of May 30, 1999 and concludes that a jury, upon examination of the facts, would conclude as did Sergeant Kuehmichel that the Trooper was not objectively reasonable in claiming he was responding to a crash, did not travel in a manner that was safe under the circumstances if he was not responding to a crash, and did not respond in a manner that complied with policy if he was responding to a crash.[36]

It is the State's position that the Employer gave Trooper Melahn ample opportunity to correct his performance deficiencies and was justified in terminating his employment subsequent to the May 30, 1999 complaint.

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[34] Exhibit E-2.
[35] Exhibit E-14.
[36] Employer's Brief at p. 22.

VII. DECISION

Where there is no contractual definition, it is reasonably implied that the parties intended application of the generally accepted meaning that has evolved in labor-management jurisprudence: that the "just cause" standard is a broad and elastic concept, involving a balance of interests and notions of fundamental fairness.

Described in very general terms, the applicable standard is one of reasonableness:

> …whether a reasonable (person) taking into account all relevant circumstances would find sufficient justification in the conduct of the employee to warrant discharge (or discipline.)[37]

As traditionally applied in labor arbitrations, the just cause standard of review requires consideration of whether an accused employee is in fact guilty of misconduct. An employer's good faith but mistaken belief that misconduct occurred will not suffice to sustain disciplinary action. If misconduct is proven, another consideration, unless contractually precluded, is whether the severity of disciplinary action is reasonably related to the seriousness of the proven offense and the employee's prior record. It is by now axiomatic that the burden of proof on both issues resides with the employer.

The Investigation.

In the Association's brief, much is made of the perceived errors in Sergeant Kuehmichel's investigation. To the contrary, I find Sergeant Kuehmichel's investigation to be full, fair, well written, and technically competent. I believe that had I been in Sergeant Kuehmichel's position, I would have reached the same conclusions and imposed the same level of discipline. The Association contends that Sergeant Kuehmichel was unfair in conducting tests

with Trooper Melahn's car, and that the results were flawed. To the contrary, I find the results to be correct, and commend Sergeant Kuehmichel for performing the tests to try to exonerate Trooper Melahn.

Additionally, the Association contends that the investigation was flawed because Sergeant Kuehmichel did not interview Dispatcher Sanderson. Again I disagree. Sergeant Kuehmichel had a complete transcript of the radio and phone conversations between Dispatcher Sanderson and Trooper Melahn so he knew with specificity what transpired on the night in question. If Trooper Melahn had been responding to a non-emergent call, Sergeant Kuehmichel had more than enough evidence to terminate the Grievant.

The Applicable Burden of Proof is Clear and Convincing Evidence.

In this case, the employee is charged with driving through a residential neighborhood at an excessive speed that was not warranted by either the circumstances or the nature of the call to which he was responding. In a case involving the discharge of an employee, the burden is on the employer to sustain its allegations, and to establish that there was just cause for the termination. As the leading treatise in the area noted:

> Discharge is recognized to be the extreme industrial penalty since the employee's job, seniority and other contractual benefits, and reputation are at stake. Because of the seriousness of the penalty, the burden generally is held to be on the employer to prove guilt of wrongdoing, and probably always so where the agreement requires "just cause" for discharge.[38]

In this context, it is appropriate for the Arbitrator to demand clear and convincing proof. As Arbitrator Richman explained:

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[37] *RCA Communications, Inc*. 29 LA 567, 571 (Harris, 1961). See also *Riley Stoker Corp*., 7 LA 764, 767 (Platt, 1947).
[38] Elkouri and Elkouri, *How Arbitration Works* 905 (5th Ed. 1987).

> The imposition of a lesser burden than clear and convincing proof fails to give consideration to the harsh effect of summary discharge upon the employee in terms of future employment.[39]

Did the State Properly Consider Trooper Melahn's Prior Conduct?

The State argues that the proper context for the termination decision made by Sergeant Richard Kuehmichel appropriately included both previous disciplinary efforts with State Trooper Melahn on judgment issues and evidence concerning what the State determined to be his final incident of poor judgment. I agree. The State further maintains that good judgment is an explicit requirement for the patrol position previously held by Trooper Melahn, that the assessment was properly based on previous employment history, and that previous arbitration decisions have recognized Employer's right to require good judgment. Again, I agree. Elkouri and Elkouri provide a useful context in which to consider this issue:

> Some consideration generally is given to the past record of any disciplined or discharged employee. An offense may be mitigated by a good past record and it may be aggravated by a poor one. Indeed, the employee's past record often is a major factor in the determination of the proper penalty for his offense.
>
> If an employee is given notice of adverse entries in his record and does not file a grievance where able to do so, an arbitrator may subsequently accept the entries on their fact without considering their merits.[40]

Certainly I have no argument with the State's contention that Trooper Melahn had exhibited poor judgment on several occasions. The Employer's Brief cites a previous arbitration decision on a trooper termination that addresses the issue of judgment, and I duly noted and paid serious attention to this argument:

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[39] *General Telephone Co. of California*, 73 LA 531, 533 (Richman, 1979). See also: *Atlantic Southeast Airlines, Inc.*, 101 LA 515 (Nolan, 1993) (using clear and convincing standard*); J. R. Simplot Co*., 103 LA 865 (Tilbury, 1994) (same); *Collins Food International, Inc*., 77 LA 483, 484-485 (Richman, 1981) (same). The Employer bears this burden of proof both with respect to proving the alleged violation, and with respect to demonstrating the appropriateness of the penalty. *Pepsi-Cola Co*., 104 LA 1141 (Hockenberry, 1995).

> "It was critical that Grievant use good judgment in making the kind of decisions he was empowered and required to make, including decisions regarding the scope of his authority. That was the quid pro quo for having the grave and serious discretion that resided in him, i.e. the responsibility of potentially making the most dire judgment calls imaginable, as a department trooper. Because of the very fact that Grievant, in that capacity, was authorized by law to deprive a citizen of his or her liberty (temporarily), or life, based only upon what he reasonably believed was happening, his repeated failure to exercise good judgment in his professional capacity was extraordinarily serious. It forced the department to question whether Grievant would exercise good judgment in other situations, including those where the stakes might be much higher."[41]

The very gravity that the State concludes must be exhibited by a trooper in the exercise of his duties must also be applied by an arbitrator when dealing with issues pertaining to what Arbitrator Richman so aptly described as "the harsh effect of summary discharge upon the employee in terms of future employment." Only if misconduct in the instance that led to the termination is proven can an arbitrator go on to address the issues of appropriateness of disciplinary action and the weight that can be accorded to the employee's previous employment history.

It must be noted that I certainly could have upheld Trooper Melahn's dismissal subsequent to the behaviors that resulted in the May 1998 economic sanction. The seriousness of these events cannot be downplayed and because of their seriousness I am uncomfortable with the decision I have to render. Had Trooper Melahn's termination been a consequence of the issues that led to the January 1999 economic sanction I again very well could have upheld the termination.

There is no question that the discipline imposed by the State would be unduly harsh if this were Trooper Melahn's first act of misconduct. However, no single act of misconduct happens in a vacuum and, given the nature and severity of Trooper Melahn's past conduct and its

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[40] *Elkouri and Elkouri, How Arbitration Works* (4th Ed. 1985).

recent occurrence, almost any act warranting discipline would justify termination. Put quite simply, on May 30, 1999 Trooper Melahn was extremely lucky to still have his job. While I was not presented with all of the facts, it appears on the basis of those facts the State did present that termination could well have been justified for either of the acts for which Trooper Melahn received pay grade reductions.

I also accept the State's argument that all of Trooper Melahn's prior discipline involved "poor judgment." While the actions Trooper Melahn was disciplined for in the past at first appear to be dissimilar, there is a common thread of "poor judgment" running through all of them. To disregard the State's theory is to allow an employee an unlimited opportunity to commit continuous acts of misconduct as long they are of a constantly varying nature. The State must have some mechanism for separating from the workforce those employees charged with enforcing the laws of the State (and who possess life and death powers over their fellow citizens) who consistently demonstrate "poor judgment."

Is Discipline Warranted?

If the facts show that a reasonable (not good or average) trooper would have perceived the dispatch of May 30, 1999 to be a non-emergency situation, I would uphold the State's position that Trooper Melahn was guilty of poor judgment and the termination would stand. While a preponderance of the evidence supports this view, it does not rise to clear and convincing evidence. The following is a statement by Sergeant Kuehmichel from the taped interview with Trooper Melahn that was conducted on June 5, 1999:

> OK. I have been called out to emergencies, you've been called out to emergencies, the conversations go a lot more like this: Kirk, we got a crash up on

[41] *OSP and OSPOA (Rawls)* at page 83 (Sorensen-Jolink, March 11, 1999)

> the highway. We've got an ambulance enroute. We need you to respond right away. OK, I'm enroute. Did you call a tow truck yet? And that's the extent of the conversation. This doesn't sound like an emergency to me. Doesn't sound like an emergency that I've ever been dispatched to. I've been dispatched to calls just like that. It's not an emergency response call. Would you not agree?[42]

While the State's argument is supported by Sergeant Kuehmichel's contention that the overall tone and content of the May 30 conversation between Dispatcher Sanderson and Trooper Melahn does not support an interpretation of it being an emergency dispatch call, this view is in conflict with dialogue elsewhere in that conversation. This is borne out by excerpts from the original taped conversation of May 30, 1999. Dispatcher Sanderson initially told Trooper Melahn: "I'm going to be sending you probably to a 12-35 that was tagged by Tanya, but maybe not, it might be a 12-16."[43] Later Dispatcher Sanderson said: "Yeah, someone called it in as a 12-16. And of course, we err for the worst case scenario." The designation 12-35 is code for an abandoned vehicle, whereas 12-16 refers to an accident, and the message conveyed here is that the dispatch could and in fact should have been construed as being of an emergency nature, at least on the face value of the Dispatcher's second referenced statement. This contradiction alone calls into question whether there is clear and convincing proof for the argument that a reasonable trooper would have unequivocally perceived the dispatch to be of a non-emergency nature. When I listen to the audio tape of the conversation between Trooper Melahn and Dispatcher Sanderson, I am shocked by the frivolity in Trooper Melahn's tone. It is only the testimony of Dispatcher Sanderson regarding the "light" manner in which he communicates with his troopers that raises any doubt in my mind. It is only by the thinnest of reeds that I have substantial doubt that Trooper Melahn assumed that he was proceeding to a 12-35, and it is only due to the clear and convincing evidence standard that he could be reinstated.

[42] Exhibit E-23.

The question then becomes whether a reasonable trooper would have expected to be disciplined under like circumstances. Had a reasonable trooper expected discipline, I would have upheld the termination given Trooper Melahn's employment history. However, there is little compelling evidence that a reasonable trooper would have expected to be disciplined under such circumstances. Indeed, none of the troopers (McGill, Snook, and Botwinis) who testified at the arbitration hearing believed speeding through a residential neighborhood to a call would result in either discipline or termination. Further, the Association points out that:

> Association President Jim Botwinis testified that he has not heard of an OSP Trooper being suspended or terminated for use of excessive speed in a residential neighborhood. The State could not articulate <u>any</u> instances of similar discipline when questioned by the Arbitrator whether others had been disciplined for like conduct.[44]

Sergeant Kuehmichel himself lends credence to the contention that discipline would not have been a given in any and all similar circumstances. In the June 6, 1999 interview he conducted with Trooper Melahn, the Sergeant says "were this an isolated incident, and you misinterpreted the dispatch call, or something like that, then I would feel a lot differently, and I would handle it a lot differently."[45] Likewise, the Zeliffs testified that they notified Trooper Melahn's supervisor because he was driving at a high rate of speed to a **non-emergency** situation, and the Personnel Complaint Report stated: "Driving 60 M/H in a residential area without an **emergency** present responding in an **emergency** manner to a **non emergent** complaint."[46] If one comes to the conclusion that a reasonable trooper could have found the call to be emergent, one could conclude that the Zeliffs would not have had such a great level of concern.

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[43] Exhibit E-16.
[44] Association's Post Hearing Memorandum at p. 21.
[45] Exhibit E-23.
[46] Exhibit E-15 (emphasis added).

The difficulty at this point is that, while Trooper Melahn's overall employment history indisputably contains errors in judgment that call into question his fitness to serve as an officer of the State, the culminating incident that led to his termination cannot reasonably be judged to be grounds for termination, inasmuch as clear and convincing evidence of a violation of rules in this instance has not been provided by the State. Whatever arguments can be made for an overall history of poor judgment cannot reasonably be considered if the ultimate cause of termination is insufficient to justify an examination of employee history.

VIII. CONCLUSION

The burden is on the State to show by clear and convincing evidence that "just cause" existed for the Grievant's termination. While the weight of evidence supported the State's position, the weight did not rise to clear and convincing. It is my decision that, based upon the facts of the case for the May 30, 1999 episode, the employer did not have just cause for termination of Senior Trooper Kirk Melahn.

IX. AWARD

The grievance is sustained. The State will offer the Grievant reinstatement to the position he held prior to his discharge.

The State will reimburse Grievant for all wages and benefits he would have been entitled to had he not been discharged, less any interim earnings (including unemployment insurance).

All fees and expenses charged by the Arbitrator shall be borne by the Department, as provided for in Section 12.3 in the parties Collective Bargaining Agreement.

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David Gaba, Arbitrator

August 11th, 2000
Seattle, Washington